Dockets: 2006-149(EI)
2006-150(EI)

BETWEEN:

A.L.D. ENTERPRISES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeal of *A.L.D. Enterprises Inc.* (2006-151(CPP)) on October 16, 2006, at Ottawa, Canada

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant:	Shelley J. «Kamin
Counsel for the Respondent:	Daniel Bourgeois

JUDGMENT

The appeals are allowed and the decisions of the Minister are varied in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 12th day of February 2007.

"D.W. Rowe"

Rowe, D.J.

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"D.W. Rowe"

Rowe, D.J.

Citation: 2007TCC71
Date: 20070212
Dockets: 2006-149(EI)
2006-150(EI)
2006-151(CPP)

BETWEEN:

A.L.D. ENTERPRISES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant (ALD or payor) appealed from a decision – dated October 14, 2005 - issued by the Minister of National Revenue (the "Minister") wherein it was decided contributions to the *Canada Pension Plan* (the "*Plan*") and premiums pursuant to the *Employment Insurance Act* (the "*Act*") were payable on the earnings paid to Remi-Paul Bellemare (Bellemare) by ALD for the period from January 1, 2003 to December 15, 2004 because Bellemare was employed under a contract of service and – therefore – was an employee of ALD.

[2] ALD also appealed a decision of the Minister issued on October 14, 2005 wherein it was decided the employment of David Parks was insurable pursuant to the *Act* and also pensionable under the *Plan* for the period from January 1, 2003 to December 17, 2004 because he was an employee of ALD and even though related to the payor's controlling shareholder, the Minister was satisfied he and ALD would

have entered into a substantially similar contract of employment had they been dealing with each other at arm's length.

[3] ALD also filed an appeal (2006-151(CPP)) from a separate decision – also dated October 14, 2005 – issued by the Minister with respect to David Parks pursuant to relevant provisions of the *Plan*.

[4] All decisions were issued by the Minister pursuant to subsection 93(3) of the *Act* and subsection 27.2(3) of the *Plan.*

[5] Counsel for the appellant and counsel for the respondent agreed the Employment Insurance (EI) appeals could proceed on common evidence and the *Plan* (CPP) appeal could follow the result.

[6] There was no issue arising from the finding by the Minister that notwithstanding the fact Parks and the shareholders of ALD were related; the Minister still considered him to have been insurable employment.

[7] Ms. Shelley Kamin - counsel for the appellant filed – as Exhibit A-1 – an Agreed Summary of Facts, (Summary) signed by her and Daniel Bourgeois, counsel for the respondent. The first portion of the Summary – Part A - is entitled: "Facts in Notice of Appeal Admitted by Respondent". The contents of paragraphs 1-20 thereof read as follows :

> 1. The Appellant at all material times carried on business year-round primarily transporting and hauling dairy products for its client, Dairyland. The products were picked up in Brampton, Ontario and delivered to the main distribution depot in Ottawa, or picked up in Trois Rivières and delivered to Brampton. The Appellant also transported and hauled some fruit juice products between Montreal and Brampton. [All NAPs, para. 1]
>
> 2. The sole shareholders and the directors of the Appellant at all material times were André and Wendy Dupuis. Mr. and Mrs. Dupuis controlled the day-to-day operations of the Appellant and made the major business decisions, including obtaining clients, engaging independent contractors, hiring and firing employees, signing contracts, and deciding on the direction of the business. Mr. Parks is the brother of Wendy Dupuis. [All NAPs, para. 2]
>
> 3. All trucks displayed the name of the Appellant. The refrigerated trailers that were hauled by the trucks displayed the name of either the Appellant or Dairyland. [All NAPs, para. 3]

4. The Appellant at all material times engaged drivers to drive the trucks. [All NAPs, para. 4]

5. David Parks and Rémi-Paul Bellemare (the "Workers") were engaged and paid by the Appellant, and performed services for the Appellant. [All NAPs, para. 6]

6. Each of the Workers was responsible for obtaining and maintaining the main tool of his trade, namely, a Z-endorsed Class A driver's licence. [All NAPs, para. 7(c)]

7. The Workers' only reporting requirement was pursuant to the *Hours of Work Regulations* under the *Highway Traffic Act* (Ontario). Under those regulations all truck drivers, whether independent contractors or employees, are required to prepare daily logs, and forward the logs and supporting documents to the motor vehicle owner (i.e., the Appellant). The regulations also require the motor vehicle owner to keep all of the daily logs and supporting documents for six months at the owner's principal place of business. [All NAPs, para. 7(d)]

8. The Workers had certain delivery deadlines because they were transporting perishable goods. However, within those product-determined deadlines, the Workers determined the manner in which they would make each delivery: their own schedule, which routes to take, meal times, and rest periods. [All NAPs, para. 7(e)]

9. Each of the Workers was paid by the Appellant based on work performed, that is, pick-ups and deliveries that he did. The Appellant made payment only following receipt of an invoice from each of the Workers. Each of the Workers issued his invoices at irregular intervals and for varying amounts, depending on the work he performed. If he did not work, for whatever reason, he was not paid. [All NAPs, para. 7(i)]

10. The Workers were not reimbursed by the Appellant for meals or any of their other expenses. The Appellant was responsible for paying for fuel and maintenance for the truck and/or trailer, and liability insurance on the loads was carried by the Appellant. [All NAPs, para. 7(g)]

11. The Workers were not entitled to any vacation, statutory holiday, sick leave, disability pension or other benefits from the Appellant. The Appellant did not deduct employment insurance ("EI"), CPP contributions or income tax from the Worker's remuneration. The Workers did not receive T4 slips. [All NAPs, para. 7(i)]

12. The CRA's Ottawa Tax Services Office determined that Mr. Parks was in insurable employment with the Appellant under the *Employment Insurance Act* during the period from January 1, 2003 to December 17, 2004. The CRA's decision concerning Mr. Parks was rendered in Employment Insurance Legislation ruling number CE0433 5114 7304[*sic*] and ruling number CE0434 9075 8398[*sic]*, dated December 17, 2004. [All NAPs, para. 9]

13. The CRA's Ottawa Tax Services Office also determined that Mr. Bellemare was in insurable employment with the Appellant during the period from January 1, 2003 to December 15, 2004. The CRA's decision concerning Mr. Bellemare was rendered in Employment Insurance Legislation ruling number CE0434 9080 32894 and ruling number CE0433 5114 6210, dated December 17, 2004. [All NAPs, para. 10]

14. The rulings mentioned above pertained only to the issue of insurable employment under the *Employment Insurance Act*, and did not address the issue of pensionable employment under the CPP. [CPP NAP, para. 11]

15. The Respondent, by the Assessments dated March 1, 2005, assessed the Appellant's 2003, 2004 and 2005 taxation years for EI premiums and CPP contributions payable by the Appellant, on the basis that the Workers were in insurable employment with the Appellant under the *Employment Insurance Act* and in pensionable employment under the CPP. [CPP NAP, para. 12; EI NAPs, para. 11]

16. The Assessment for the 2003 taxation year identified the amounts payable as federal and provincial tax. The Assessment for 2005 assessed EI premiums and CPP contributions payable by the Appellant with respect to Mr. Parks, even though the period covered by the rulings did not extend to the 2005 taxation year. [CPP NAP, para. 13; EI NAPs, para.12]

17. The Appellant on March 16, 2005 made appeals to the Respondent from the above-mentioned rulings under section 91 of the *Employment Insurance Act.* [CPP NAP, para. 14; EI NAPs, para. 13]

18. In addition, the Appellant on May 27, 2005 made appeals to the Respondent from the Assessments for the 2004 and 2005 taxation years under section 27.1 of the CPP and section 92 of the *Employment Insurance Act*, and served the Respondent with a Notice of Objection under the *Income Tax Act* to the Assessment for the 2003 taxation year. [CPP NAP, para. 15; EI NAPs, para. 14]

19. The Respondent decided that the Workers were in insurable and pensionable employment with the Appellant, and those decisions were communicated to the Appellant on October 14, 2005. The Respondent purported to deal with

the Appellant's appeal of a ruling on whether CPP contributions were payable, even though there was no such ruling and the Appellant had not filed any such appeal. [CPP NAP, para.16; EI NAPs, para. 15]

20. To date, the Respondent has not formally notified the Appellant of the Respondent's decision on the reconsideration of the Assessments. [CPP NAP, para. 17; EI NAPs, para. 16]

[8] In Part B of the Summary, the respondent denied the allegation in the Notices of Appeal that ALD was a client of the workers.

[9] Part C of the Summary set out – in paragraphs 1-11, inclusive – facts contained in the Notice(s) of Appeal of which the respondent had no knowledge.

[10] Part D of said Summary set out – in paragraphs 1-5, inclusive – assumptions of fact relied on the respondent in the Replies to the Notices of Appeal which were denied by the appellant. These are as follows:

1. The Workers were required to meet deadlines and timeframes imposed by the Appellant to meet the needs of the Appellant's customers. [CPP and Parks Reply, para. 15(h); Bellemare Reply, para. 15(g)]

2. The Workers' rates of pay were based on kilometres driven and charged a flat rate for going depot to depot. [CPP Reply, para. 15(i)]

3. Mr. Bellemare's rate of pay was based on kilometres driven (0.245/km). [Bellemare Reply, para. 15(h)]

4. The Workers did not have the right to hire helpers without the Appellant's consent. [CPP Reply, para. 15(y); Parks and Bellemare Replies, para. 15(x)]

5. The Workers had to provide their services personally. [CPP Reply, para. 15(aa); Parks and Bellemare Replies, para. 15(z)]

[11] David Parks testified he resides in Ottawa and has driven a truck for ALD – on and off – for 6 or 7 years. He described himself as an independent contractor and stated he had discussed that matter with his brother-in-law André (Andy) Dupuis, who controlled the operations of that company. Parks stated he wanted to be an independent contractor rather than an employee and had provided certain construction services to ALD in his capacity as a private contractor. He had also done similar work for other customers in 2003 and sent them invoices for his work which were included in the bundle of invoices – filed as Exhibit A-2 – pertaining to his truck driving services provided to ALD. Parks referred to invoice #6 – in said bundle

– issued to a customer for $1,230.00 - based on an hourly rate of $15 - for performing certain construction work. Parks was registered pursuant to the Goods and Services Tax (GST) provisions of the *Excise Tax Act* and charged GST in the sum of $86.10 with respect to his services and sought reimbursement for the cost of materials supplied to the job. Parks also referred to invoice #7 – in which he charged a customer the sum of $1,346.05 for materials purchased as well as a flat rate of $750.00 for performance of the work, together with GST. Parks stated he had provided his services - as a building contractor - to ALD pertaining to an addition to the company office in the Dupuis residence and sent an invoice - #9 – dated 10/06/2003 - in which he charged a total of $1,900.00 for labour together with an amount to reimburse him for materials purchased. Again, GST was collected by Parks on the amount attributable to his labour. Parks stated the finished job cost less than he had estimated at the outset and so discounted the labour portion of the invoice by $400.00. Parks was referred to invoice #14 – issued to another customer – dated 28/10/2003 - in which he charged the sum of $400 for his services and added the correct amount - $28.00 – for GST. With respect to providing his services to ALD as a truck driver, Parks stated he had an informal arrangement with Dupuis whereby he perused a list of trips offered by ALD to various locations, some of which he refused, including Trois Rivières, Québec, because his ability to speak French was limited. Parks stated he did not drive truck for other companies in 2004 but when he chose to drive a particular trip, was able to take a relative or friend along for the ride. Parks stated he did not have an office in the premises occupied by ALD and did not have to report to anyone at ALD either before or after a trip. Ontario legislation required him to complete a Driver's Daily Log (log) pertaining to the trips driven and he left the relevant documents in the truck. Several examples of the daily log sheets were filed as Exhibit A-3. He purchased his own log book and submitted the completed forms to ALD so it could forward them to the appropriate Ministry of the Ontario government. In order to drive a particular route, Parks picked up the Volvo tractor and 3-axle trailer – owned by ALD - at one of two locations. ALD was in the business of hauling finished milk products for its main client, Saputo Foods Ltd. (Saputo) that used the trade name Dairyland. Parks estimated the value of the combined tractor-trailer unit as about $200,000. He held a Z-endorsed Class A driver's licence which was necessary in order to operate that type of vehicle and equipment. In order to obtain that licence, he had to pass appropriate examinations and road tests and there was a mandatory application for renewal after a certain period for which a medical examination was required. He was responsible for all costs associated with obtaining and maintaining the proper licence. Within the bundle of invoices at Exhibit A-2, there were several issued by Parks to ALD with respect to driving certain distances between named geographical locations on specific dates. Parks stated he charged ALD the sum of 20 cents a kilometre plus a separate charge

of $10 for participating in any loading or unloading of product at a particular location. Parks referred to an invoice – Exhibit A-4 – submitted by him to ALD in which he charged 20 cents per kilometre for various trips as well as several separate charges of $10 for delivery. The invoice – dated 02/04/2004 - in the sum of $4,274.22 - included GST - and that amount was paid by ALD in the form of cheque - dated April 3, 2004 - as evidenced by the photocopy at the bottom of the second page of said Exhibit. Parks filed - as Exhibit A-5 – copies of his GST returns for 2003, including therein revenue generated from his building renovation activities, and also for 2004, in which year all the revenue generated was derived from driving truck for ALD. Parks stated he paid his own meal expenses, and purchased work boots, cell phone, safety equipment and small tools that were needed from time to time during trips. Parks recalled there had been a Canada Customs and Revenue Agency (CCRA) payroll audit of ALD, subsequent to which he and Dupuis entered into an agreement – Exhibit A-6 – which, although undated, he believed was signed at some point in 2003 or 2004, at the request of Dupuis. Earlier, there had been no written agreement pertaining to the supply of his services to ALD as a truck driver during various periods since the mid-1990s. In Park's view, the written agreement merely set out what had always been the arrangement between himself and Dupuis – on behalf of ALD – throughout their relationship, whether he was driving a truck or doing renovation/construction work. Parks stated he had received a demand from CCRA to file tax returns for certain years and on May 19, 2006, filed his return of income for 2003 – Exhibit A-7 – on the basis it was business income and included Schedule 8 pertaining to CPP contributions on self-employment and other earnings. Within said tax return, he filed a Statement of Business Activities in which he claimed certain items – including meals and entertainment in the sum of $2,760.00 - for a total business expense of $7,497.51. With respect to his 2004 taxation year, Parks had filed a tax return – Exhibit A-8 – on April 30, 2005 - in which he reported the sum of $42,104.60 as business income, all of which was derived from driving for ALD. In the Statement of Business Activities, he claimed total expenses in the sum of $6,117.50 including the sum of $110 relating to the cost of renewing his driver's licence and a total of $6,007.50 representing the allowable 50% portion of total meal expenditure. Parks identified assessments for his 2003 and 2004 taxation years issued by the Minister, copies of which were filed as Exhibit A-9.

[12] Parks was cross-examined by counsel for the respondent and stated he spoke to Dupuis or someone else at the ALD office about once a week in order to discuss the trips available during the forthcoming week such as carrying loads of cheese to Toronto and hauling certain cargo on the return trip. Parks stated each trip took one or more days to complete. Usually, he hauled empty cases to Brampton, Ontario and picked up a full load of dairy products for distribution to vendors in other centres

according to a fixed schedule. Parks was an experienced driver and chose his routes accordingly but acknowledged that once he accepted a trip or series of trips he was required to conform with the deadlines and other requirements pertaining to delivery of his loads. In addition to his own cell phone which he used for business purposes, the ALD trucks were equipped with a communication device. Parks agreed the daily log had to be completed by him and submitted to ALD and that failure to comply with Ontario regulations could cause a problem for the company. Parks was referred to the daily log sheets in Exhibit A-3 – and explained the graph therein was designed so a driver could record off-duty time other than in a sleeper or berth within the tractor, off-duty time spent in a sleeper or berth as well as actual driving time. Another entry recorded on-duty time spent at tasks other than driving such as loading, unloading, inspecting the vehicle or completing necessary paperwork. Parks stated he drove full-time for ALD in 2004 and provincial regulations permitted him to drive a maximum of 60 hours in a 7-day period. With respect to the remuneration paid to him by ALD, Parks stated he chose the sum of 20 cents per kilometre as a rate that was reasonable and within the range paid by transport companies to drivers within the industry. In 2004, Parks did not bother searching out any other work – including construction jobs - since he had enough driving assignments from ALD. Even though he took others along with him on some trips, Parks agreed he had to drive the tractor personally. Although a clause in the agreement – Exhibit A-6 – required Parks to indemnify and save harmless ALD from any and all claims arising out of the performance of his duties, he had not taken out any liability insurance coverage. He stated he considered himself responsible for his load barring damage or loss due to unforeseen events. On some routes, it required 5 or 6 stops to off-load product and he charged $10.00 for each occurrence when he submitted an invoice to ALD.

[13] Remi-Paul Bellemare (Bellemare) testified he resides in Orleans, Ontario and started driving for ALD in 2003. Earlier, he had driven a truck for one of ALD's competitors on the basis he was an independent contractor. When he spoke with Andy Dupuis about driving for ALD, he made it clear he wanted to be an independent contractor rather than an employee because he preferred the freedom he believed to be inherent in that status. After starting work with ALD, Bellemare phoned Dupuis each Sunday and was advised of the routes available for the forthcoming week. Bellemare stated he refused – once - to take a trip because he was too tired. He considered he was free – at all times in 2003 and 2004 – to have driven for other companies but had no need to do so. In his opinion, ALD had better equipment than other transport companies. On two occasions, he allowed his father –

an experienced, duly licenced truck driver – to drive the tractor/trailer unit for part of the trip and did not reimburse him except for buying lunch. Other times, without prior permission from ALD management, Parks took his wife and also his uncle on some trips. Bellemare stated if he accepted a trip or series of trips, he left his home and drove to Perth where he picked up the truck and trailer which were parked at a truck dealership lot. He charged ALD a flat fee in order to cover the cost of gas while traveling to and from Perth to pick up and drop off the truck. He left his driver's log in the truck or in a special box at a location in Toronto. In the course of carrying out his duties, he did not deal with customers directly in terms of presenting invoices or collecting payments. He owned his own safety books and some hand tools. ALD owned the truck and trailer. Bellemare stated he was the holder of a Z-endorsed, Class A licence, renewable every 5 years at a cost of $40 plus a fee of $75 to pay for the requisite medical examination. He was referred to an invoice - dated 3/04/04 – Exhibit A-10 – which he prepared and faxed from his home to the ALD office. He charged for several trips, amounting to $1,876.98, and added GST in the sum of $131.39. He quoted his GST number on the invoice and received total payment of $2,008.37 in the form of a cheque from ALD dated April 2, 04, a photocopy of which was included on the bottom of the same sheet. According to said invoice, he made 2 trips to CTR (Trois Rivières) – 4 to Brampton directly from Ottawa - 2 to Cornwall and a return trip from Perth to Trois Rivières. Although not specifically itemized thereon, he also charged an amount for gas used to travel from his home to and from Perth. Bellemare stated the invoice – Exhibit A-10 – was typical to others that he issued every two weeks. The invoice form had not been provided by ALD nor did Dupuis dictate the manner in which it was to be completed. Bellemare stated he submitted GST returns for 2003 - Exhibit A-11 – and 2004 – Exhibit A-12 - to CCRA on a quarterly basis. For those years, all the GST reported by Bellemare was collected from ALD. Bellemare identified an undated agreement – Exhibit A-13 – as the document he and Dupuis signed in April, 2004. Bellemare stated he presented the concept to Dupuis who – later – handed him with the written document entitled Independent Contractor Agreement. Bellemare stated he considered the agreement merely confirmed and ratified the existing relationship between him and ALD. He stated the decision of the Minister is incorrect in that he did not drive for ALD until December 15, 2004. Instead, at the end of October, 2004, he severed his relationship and accepted a driving job – as an employee – with an Ottawa company that did not involve out-of-town trips. In his new position, he has to wear a uniform, reports every day to the office and receives his pay every two weeks – by automatic deposit – less source deductions. In preparing his own income tax returns for the 2003 and 2004 taxation years using certain tax preparation software, he did not report revenue earned from ALD as business income but as "other employment income" on the relevant line in those returns. Later, he had discussions with certain officials at

CCRA to explain the situation and provided details of his working relationship with ALD. Later, he received notices – Exhibit A-14 – for reassessments of those taxation years based on his assertion he had earned the reported income as a self-employed person in the context of business income. During his discussions with CCRA officials, he had disclosed the ruling by the Minister that he had been an employee of ALD during the relevant period.

[14] In cross-examination, Bellemare agreed that once he accepted a particular trip, he had to abide by the delivery schedule. He stated Dupuis was aware his father was a duly qualified truck driver and although he thought he could have hired another driver to complete a route – if necessary – that situation never arose and there had been no need to discuss that subject with Dupuis. He agreed that a publication – Trucking News – contained information concerning rates paid per kilometre to drivers. In the course of submitting invoices to ALD, Bellemare used the round number of $200 for an Ottawa -Toronto return trip plus a $25 delivery charge. Bellemare stated the $200 amount had a reference to the distance driven and thought it was based on a rate of approximately 25 cents per kilometre. At the outset, he had been informed by Dupuis of the geographical locations he would be visiting in the course of his duties and – using the per kilometre rate - calculated sums to be expressed as round numbers when submitting an invoice for driving between various places. In the beginning, Bellemare advised Dupuis he would charge a fee of $15 for every trip from Ottawa to Perth – about 100 kilometres – to pick up a truck and to return home after completing the trip. Bellemare stated he thought the status of employee while providing his services to ALD might have left him “trapped” in the event ALD lost the contract with its major – or perhaps, only - client, Saputo.

[15] In re-direct examination, Bellemare stated he knew an audit of ALD had been performed by CCRA in 2004 but is certain he signed the agreement - Exhibit A-13 – before he stopped working for ALD at the end of October, 2004.

[16] André Dupuis testified he is a businessman residing in Perth, Ontario. He and his wife – Wendy – own and control ALD. Prior to 2003 and 2004, the business operated 4 trucks that hauled milk, juice and cheese for Saputo. In 2003, ALD had 5 drivers and in 2004 operated with 4 drivers - as independent contractors – plus two others – not Parks and Bellemare – who had the status of employee. Dupuis identified a T-4 Summary for 2004 – Exhibit A-15 – in which 5 employees were named, including himself and Wendy. Dupuis stated that in his experience over many years, he had better results from hiring drivers as independent contractors rather than as employees even though the independent drivers could refuse trips and thereby dictate the days they wanted to work. In the past, employees had left their jobs

without warning and sometimes abused equipment. In his opinion, it was not possible to take remedial action against an employee whereas an independent contractor could be pursued for damage caused by negligence in the performance of contractual duties. In terms of discipline, an employee had to be dealt with in a particular manner whereas work could be withheld from an independent contractor in the event performance was not satisfactory. Dupuis stated he did not know why Parks and Bellemare were chosen for purposes of the ruling issued subsequent to the CCRA audit since other drivers were operating under independent contractor status and had performed their work in the same manner. Dupuis stated Saputo was the only client of ALD and there was no written contract with that company nor any guarantee of ongoing work. With respect to the issue of driver's logs, Dupuis stated the logs must be submitted to the appropriate government department within a timely manner or the drivers may lose their licence and ALD could be fined and subjected to demerit points which – if enough are accumulated – could lead to cancellation of an operating licence by the Minister of Transport. Dupuis stated time is a critical factor concerning delivery of products from Brampton to the Saputo facility in Ottawa. There was no need for a driver to report to the ALD office and once Dupuis was told by Parks he was taking a 5-week holiday and would not be available to drive any trips. Dupuis characterized that as an announcement – based on courtesy - by an independent contractor rather than a request to take time off that one would expect from an employee. Parks and Bellemare and other independent drivers did not need to attend any ALD staff meetings. ALD owned one tractor and leased 5 others. The tractors can cost up to $150,000 and the trailers – mostly leased - were valued between $70,000 and $90,000 but ALD owned some less expensive trailers. Dupuis stated he drives a truck and has worked in that capacity since 1991 when he bought a truck and thereafter delivered dairy products for a company before starting – in 1998 - to haul for Saputo. Dupuis stated it is common within the trucking industry for drivers to be hired as independent contractors and that had been the basis upon which Bellemare had provided services to another trucking company before starting to drive for ALD. No training was provided to either Parks or Bellemare. The written agreement with Parks – Exhibit A-6 – and with Bellemare – Exhibit A-13 – were both signed sometime in 2004 after the CCRA audit. Dupuis stated he considered Parks and Bellemare were free to drive for other transport companies hauling various products and in the event one or both had left on short notice, he had a back-up plan whereby Saputo could have provided drivers for a short term until replacements were found. Dupuis was referred to the ALD financial statement – Exhibit A-16 – for the year ended December 31, 2004. It also contained comparative figures for 2003 in a separate column. In 2003, under the heading " Subcontractors", ALD paid the sum of $177,078 to drivers and in 2004, the expense noted under that category was $221,684. Dupuis stated this expense was incurred in respect of the services of 5

drivers. The financial statement showed an expense in the sum of $207,333 for "Wages and Benefits" incurred in respect of a total of 5 employees including 2 drivers, himself, his wife and his son. ALD had purchased jackets for all drivers with the company logo on the front. Currently, Saputo provides the jackets. Dupuis pointed out the net profit of ALD is relatively small and that the trucking business provided employment for himself – as a driver in 2003 and 2004 - and for his wife and their son. The drivers who held the status of employees in 2003 and 2004 were paid every 2 weeks and were entitled to vacation pay. Source deductions were made from their cheques and they were paid without the need to submit any invoices. Dupuis identified three Notices of Assessment – Exhibit A-17 - issued by CCRA to ALD with respect to amounts owing for various items including EI premiums and CPP contributions for employees.

[17] In cross-examination by counsel for the respondent, Dupuis stated he scheduled the loads on the basis of supplying the needs of Saputo as it required a trucking company to transport products from Brampton to Ottawa several times each week as well as to haul loads to Trois Rivières on a regular basis. Dupuis explained that in the course of making the necessary trips, Parks would be away from Ottawa for several days within a week. A list of trips or runs was prepared for Parks and for Bellemare and in the event one or other could not make a trip there were other drivers who could have been contracted to fill in. Dupuis stated that Parks is his brother-in-law and has been driving for ALD – on and off - for 15 years. Other independent contractor drivers have been with the company for 8 years and 6 years. Dupuis noted that group of drivers seemed to "enjoy the freedom" resulting from that status as opposed to being an employee. Parks preferred to charge on a per kilometre basis while Bellemare invoiced a flat rate for trips which was based – mainly – on the total distance driven between various points within a certain period. Dupuis agreed drivers did not have the right to hire someone to drive a route for them without obtaining permission from ALD but all drivers could bring a friend or relative on a trip. Dupuis stated Parks left Ottawa on Sunday, returned on Wednesday, left that night on another trip, and returned Saturday morning. Each truck was equipped with a combination telephone walkie-talkie.

[18] Counsel for the appellant submitted the evidence demonstrated clearly the intention of Parks, Bellemare and Dupuis – on behalf of ALD – was that the working relationship would be that of independent contractor rather than employee. Counsel pointed to a lack of control over the manner and method of providing the driving services and noted the only form of reporting was the requirement that a driver's daily log be maintained in order to comply with provincial and/or federal regulations. The drivers incurred expenses in the course of carrying out their task, owned their

own tools and safety equipment and had the right to choose whether to take a particular trip or series of trips. Counsel submitted the parties intention to structure the working relationship was confirmed by the manner in which they conducted their affairs throughout the relevant period. In her view, the fact Parks performed other services for ALD during 2003 – and earlier – as a contractor/renovator on the basis he was operating his own business, was significant in that it corroborated the existence of an intention between him and Dupuis that there was never an employer-employee relationship existing between Parks and ALD no matter what services were provided by Parks.

[19] Counsel for the respondent submitted it was obvious the main tools – tractor and trailer – were expensive pieces of equipment and were owned or leased by ALD. He conceded the drivers wanted to be accorded the status of independent contractors but when one applies the tests referred to in the relevant jurisprudence, it becomes apparent each was functioning in a manner completely consistent with a worker who is an employee. Although there was no control in the usual, supervisory sense, there were deadlines that had to be met and the trips – once assigned – were specific and had to be carried out personally by the named driver. Counsel acknowledged that a driver could refuse work but that was not done in order to generate more revenue by driving for a competitor of ALD and overall there was no opportunity for profit by hiring someone to drive the trip at a cheaper rate nor was there any risk of loss nor any need to manage helpers. In counsel's view of the evidence, there was little to support a finding that the drivers were operating a business and the only conclusion to be drawn is that both Parks and Bellemare were truck drivers who provided ALD with their skills, each pursuant to a contract of service.

[20] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – (*Sagaz*) dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 45 to 48, inclusive, of his judgment stated:

> Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, ... ("Enterprise control: The servant-independent contractor distinction" (1987), 37

U.T.L.J. 25, at p. 29) sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An "enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in London Drugs where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents".

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, ... ([1952] 1 The Times L.R. 101) that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations..." (p. 416) Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, ...(Vicarious Liability in the Law of Torts. London: Butterworths, 1967) at p. 38, that what must always occur is a search for the total relationship of the parties:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[21] I will examine the facts in relation to the indicia set forth in the judgment of Major, J. in *Sagaz.*

Level of control:

[22] The only reporting requirement imposed on Parks and Bellemare was to comply with relevant government regulations pertaining to their hours of work while carrying out their duties as truck drivers. Because they were transporting perishable goods, they were subject to delivery deadlines. Otherwise, they were free to decide which route to take and when to schedule stops to meals, rest periods or to perform vehicle inspections. They were not required to accept any particular trips and Bellemare once informed Dupuis he would not be available to drive for a 5-week period because he was taking a holiday outside Canada. Once a driver agreed to drive a trip or series of trips during a specified period – usually a week – he was usually no longer in contact with ADL until those routes had been completed and the tractor-trailer unit had been returned to the storage location. Parks and Bellemare were free to accept or refuse certain trips and telephoned each week - on their own initiative - to find out which routes were available. Both drivers were duly qualified, licenced and experienced and did not need any training. They could bring friends or family members along with them without having to obtain permission from ADL management.

Provision of equipment and/or helpers

[23] The most important equipment was the tractor and trailer units which were either owned or leased by ALD. Without those expensive vehicle combinations, the Saputo product could not be carried from point to point. The drivers provided safety equipment such as vests and shoes and owned small hand tools. Parks had his own cell phone which he stated was for business reasons - although there was no example of such use provided in the course of his testimony - even though each tractor was equipped with a telephone/walkie-talkie device to communicate from truck to truck, to the ADL office or otherwise as required. The evidence disclosed that ALD and Parks and Bellemare understood the driving service had to be performed personally. Neither of them nor any other drivers operating as independent contractors had the right to subcontract their routes to other drivers who may have been willing to drive

those trips for a rate per kilometre less than that paid by ALD and then pocket the difference.

Degree of financial risk and responsibility for investment and management

[24] The only risk incurred by Parks and Bellemare was that by choosing to operate under a perceived status of independent contractor rather than employee, they were not eligible for certain compensation such as vacation pay or to severance pay and other entitlements established pursuant to provincial labour standards in the event their work ended. Parks invoiced ALD according to a set amount per kilometre plus a $10 charge for each delivery and Bellemare opted to send a statement for each period in which he charged a flat fee for traveling between certain points together with a delivery charge and the sum of $15 to cover the cost of traveling to and from his home to Perth to pick up his tractor unit. There was no financial risk except as imposed by the paragraph in their written Independent Contractor Agreement with ALD wherein they agreed to indemnify and save harmless ALD from any and all claims arising out of the performance of their duties. Parks and Bellemare also understood the availability of trips depended on ALD retaining its relationship with Saputo, its only client during the relevant period. Further, each driver was offered driving assignments on a weekly basis so there was no guarantee of ongoing work beyond that period. Neither Parks nor Bellemare was required to participate in any aspect of management nor were they fixed with any responsibility with respect to their services other than to maintain a proper driver's licence and to comply with the requirement to complete and submit a daily log. They did not deal directly with any customers and merely picked up product, drove it to a location, and assisted – sometimes – with loading or unloading and returned the tractor-trailer unit to the assigned parking location.

Opportunity for profit in the performance of tasks

[25] The only way in which Parks and Bellemare could earn more money was to drive more kilometres or to load or unload more often in the course of trips so they could invoice more delivery charges which were remunerated at a flat rate. Since they paid their own meals, accommodation and other related expenses while on the road, they could exert some control in that regard by choosing to sleep in the tractor berth rather than in a motel and by bringing their own food to reduce the cost of eating in restaurants. Other work-related costs were insignificant and there was no chance their gross revenue would be exceeded by expenses. The cost of operating the tractor-trailer units was borne exclusively by ALD and neither Parks nor Bellemare had taken out any insurance coverage with respect to the potential liability imposed by one of the conditions of their written agreement with ALD.

[26] In the case of *Minister of National Revenue v. Emily Standing*, [1992] F.C.J. No. 890 Stone, J.A. stated:

> ...There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the **Wiebe Door** test ...

[27] In *Wolf v. Canada*, [2002] DTC 6853, the Federal Court of Appeal – post - *Sagaz* – considered the income tax appeal of a mechanical engineer specializing within the aerospace industry. The question arose whether that appellant was an employee of Canadair or an independent contractor. Analysis of the various factors to be taken into account in deciding this issue was based upon the relevant articles of the Civil Code of Québec in addition to the applicable jurisprudence up to and including the decision of the Supreme Court of Canada in *Sagaz, supra.*

[28] Prior to concluding that the engineer's relationship with Canadair had been that of an independent contractor, Desjardins, J.A. - at paragraph 93 of her reasons for judgment – stated:

> Both Canadair's work and the appellant's work were integrated in the sense that they were directed to the same operation and pursued the same goal, namely the certification of the aircraft. Considering, however, the fact that the integration factor is to be considered from the perspective of the employee, it is clear that this integration was an incomplete one. The appellant was at Canadair to provide a temporary helping hand in a limited field of expertise, namely his own. In answering the question 'whose business is it?' from that angle, the appellant's business stands independently. Once Canadair's project was completed, the appellant was, so to speak, ejected from his job. He had to seek other work in the market place. He could not stay at Canadair unless another project was under way.

[29] Décary, J.A. – concurring in the result – commented at paragraph 115 of his reasons:

> As a starting point, I would like to quote the very first paragraph of an article written by Alain Gaucher (A Worker's Status as Employee or Independent Contractor, 1999 Conference Report of Proceedings of the 51st Tax Conference of the Canadian Tax Foundation, p. 33.1):
>
> > In an ever-changing Canadian economy, the legal relevance of a worker's status as independent contractor or employee continues to be important. The issues relating to employment status will only increase in importance as employers continue to move toward hiring practices that favour independent contractors and a greater number of

> individuals enter or re-enter the work force as independent contractors.

[30] At paragraphs 117 to 120, inclusive, Décary, J.A. continued as follows:

> The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e the intention of the parties. Article 1425 of the Civil Code of Quebec establishes the principle that ' [t] he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract'. Article 1426 C.C.Q. goes on to say that ' [i] n interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account'.
>
> We are dealing here with a type of worker who chooses to offer his services as an independent contractor rather than as an employee and with a type of enterprise that chooses to hire independent contractors rather than employees. The worker deliberately sacrifices security for freedom ('the pay was much better, the job security was not there, there were no benefits involved as an employee receives, such as medical benefits, pension, things of that nature...' Mr. Wolf's testimony, Appeal Book, vol. 2, p. 24). The hiring company deliberately uses independent contractors for a given work at a given time ('it involves better pay with less job security because consultants are used to fill in gaps when local employment or the workload is unusually high, or the company does not want to hire additional employees and then lay them off. They'll hire consultants because they can just terminate the contract at any time, and there's no liabilities involved', ibid., p. 26). The hiring company does not, in its day-to-day operations, treat its consultants the same way it treats its employees (see para. 68 of Madam Justice Desjardins's reasons). The whole working relationship begins and continues on the basis that there is no control and no subordination.
>
> Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. Should that not be enough, suffice it to add, in the case at bar, that the circumstances in which the contract was formed, the interpretation already given to it by the parties and usage in the aeronautic industry all lead to the conclusion that Mr. Wolf is in no position of subordination and that Canadair is in no position of control. The 'central question' was defined by Major, J. in Sagaz as being 'whether the person who has been engaged to perform the services is performing them as a person in business on his own account'. Clearly, in my view,

> Mr. Wolf is performing his professional services as a person in business on his own account.
>
> In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterized as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

[31] In his brief judgment - also concurring in the result - Noël, J.A. considered the matter of intention of the parties and his reasons are reproduced below:

> I too would allow the appeal. In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.
>
> My assessment of the applicable legal tests to the facts of this case is essentially the same as that of my colleagues. I view their assessment of the control test, the integration test and the ownership of tool tests as not being conclusive either way. With respect to financial risk, I respectfully agree with my colleagues that the appellant in consideration for a higher pay gave up many of the benefits which usually accrue to an employee including job security. However, I also agree with the Tax Court Judge that the appellant was paid for hours worked regardless of the results achieved and that in that sense he bore no more risk than an ordinary employee. My assessment of the total relationship of the parties yields no clear result which is why I believe regard must be had to how the parties viewed their relationship.
>
> This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding (Compare Montreal v. Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161 at 170).

[32] After *Wolf*, life became even more exciting with the release of the judgment of the Federal Court of Appeal in *The Royal Winnipeg Ballet v. The Minister of National Revenue* 2006 DTC 6323. (*RWB*) The issue therein was whether the dancers performing for that world-renowned ballet company were employees or independent contractors. The Royal Winnipeg Ballet (RWB) was supported in its position by Canadian Actors' Equity Association (CAEA) as the bargaining agent for the dancers. In the course of deciding the dancers were not employees of RWB, at paragraphs 60-65, inclusive of her reasons Sharlow, J. A. stated:

> [60] Décary, J.A. was not saying that the legal nature of a particular relationship is always what the parties say it is. He was referring particularly to Articles 1425 and 1426 of the *Civil Code of Quebec*, which state principles of the law of contract that are also present in the common law. One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.
>
> [61] I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins, J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.
>
> [62] It is common for a dispute to arise as to whether the contractual intention professed by one party is shared by the other. Particularly in appeals under the *Canada Pension Plan* and the *Employment Insurance Act*, the parties may present conflicting evidence as to what they intended their legal relationship to be. Such a dispute typically arises when an individual is engaged to provide services and signs a form of agreement presented by an employer, in which she is stated to be an independent contractor. The employer may have included that clause in the agreement in order to avoid creating an employment relationship. The individual may later assert that she was an employee. She may testify that she felt coerced into signifying her consent to the written form of the contract because of financial need or other circumstances. Or, she may testify that she believed, despite signing a contract containing such language, that she would be treated like others who were clearly employees. Although the court in such a case may conclude, based on the *Wiebe Door* factors, that the individual is an employee, that does not mean that the intention of the parties is irrelevant. Indeed, their common intention as to most of the terms of their contract is probably not in dispute. It means only that a stipulation in a

> contract as to the legal nature of the relationship created by the contract cannot be determinative.
>
> [63] What is unusual in this case is that there is no written agreement that purports to characterize the legal relationship between the dancers and the RWB, but at the same time there is no dispute between the parties as to what they believe that relationship to be. The evidence is that the RWB, the CAEA and the dancers all believed that the dancers were self-employed, and that they acted accordingly. The dispute as to the legal relationship between the dancers and the RWB arises because a third party (the Minister), who has a legitimate interest in a correct determination of that legal relationship, whishes to assert that the evidence of the parties as to their common understanding should be disregarded because it is not consistent with the objective facts.
>
> [64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[33] Sharlow, J.A. referred to the factors considered by the Tax Court of Canada. At paragraph 65 and following, she stated:

> [65] The judge chose the following factors as relevant to the *Wiebe Door* analysis (it is not suggested that he chose the wrong factors or that there are any relevant factors that he failed to consider):
>
> . The indispensable element of individual artistic expression necessarily rests with the dancers. The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.
>
> . The dancers have no management or investment responsibilities with respect to their work with the RWB.
>
> . The dancers bear little financial risk for the work they do for the RWB for the particular season for which they are engaged. However, their engagements with the RWB are for a single season and they have no assurance of being engaged in the next season.

. The dancers have some chance of profit, even within their engagement with the RWB, in that they may negotiate for remuneration in addition to what is provided by the Canadian Ballet Agreement. However, for the most part remuneration from the RWB is based on seniority and there is little movement from that scale.

. The career of a dancer is susceptible to being managed, particularly as the dancer gains experience. Dancers engaged by the RWB have considerable freedom to accept outside engagements, although there are significant contractual restrictions (the need for the consent of the RWB, and the obligation to hold themselves out as being engaged by the RWB).

. Although the dancers bear many costs related to their engagement with the RWB and their dancing careers generally, the RWB is obliged to provide dance shoes, costumes, tights, wigs and certain other necessary items.

. The dancers are responsible for keeping themselves physically fit for the roles they are assigned. However, the RWB is obliged by contract to provide certain health related benefits and warm-up classes.

[66] The control factor in this case, as in most cases, requires particular attention. It seems to me that while the degree of control exercised by the RWB over the work of the dancers is extensive, it is no more than is needed to stage a series of ballets over a well planned season of performances. If the RWB were to stage a ballet using guest artists in all principal roles, the RWB's control over the guest artists would be the same as if each role were performed by a dancer engaged for the season. If it is accepted (as it must be), that a guest artist may accept a role with the RWB without becoming its employee, then the element of control must be consistent with the guest artist being an independent contractor. Therefore, the elements of control in this case cannot reasonably be considered to be inconsistent with the parties' understanding that the dancers were independent contractors.

[67] The same can be said of all of the factors, considered in their entirety, in the context of the nature of the activities of the RWB and the work of the dancers engaged by the RWB. In my view, this is a case where the common understanding of the parties as to the nature of their legal relationship is borne out by the contractual terms and the other relevant facts.

[34] In concurring reasons, Desjardins, J.A. – at paragraphs 71 and 72 – stated:

[71] The determination of whether or not the parties have entered into a contract of employment for the purpose of the EI or the CPP has proven over the years to be a difficult and somewhat perilous exercise as the jurisprudence of our Court demonstrates. I would not deprive the common law judge of the possibility of being made apprised of the intention of the parties so as to test such intention against

objective factors and the surrounding circumstances of the case when he makes the final determination.

[72] As demonstrated by Sharlow, J.A., if the intention of the parties is uncontested, save by third parties, as in the case at bar, the common law judge has nevertheless the responsibility to "look to see" if the terms used and the surrounding circumstances are compatible with what the parties say their contract is. The common law judge must make sure that what the parties say they have agreed upon is in fact what is contained in the contract they have signed.

[35] Desjardins, J.A. continued at paragraphs 79-81 inclusive as follows:

[79] In the case at bar, it is the nature of the contract which must be determined, through an analysis of its terms in light of the fourfold test, namely the level of control, the ownership of the equipment, the degree of financial risk and the opportunity for profit.

[80] Given the above case law, I see no compelling reason why the common law judge, who embarks on the difficult task of determining whether a contract is one of service or for service, should be deprived of the possibility of adverting to as many criteria and indicia as may reasonably be recognized in order to assess the true nature of the relationship governing the parties.

[81] The Tax Court judge erred in law, in my view, when he said that the intention of the parties could only be used as a tie-breaker (paras. 31 and 82 of his reasons). I accept Sharlow, J.A.'s analysis, at para. 64 of her reasons, that what the Tax Court judge should have done was to take note of the uncontradicted evidence of the parties' common understanding that the dancers should be independent contractors and then consider, based on the *Wiebe Door* factors, whether that intention was fulfilled. In so doing, she relied, at para. 61 of her reasons, on a long line of cases of this Court as expressed by Stone, J.A. in *Standing v. Canada (Minister of National Revenue* – M.N.R.), (1992), 147 N.R. 238, which I reformulated in *Wolf v. Canada*, [2002] 4 F.C. 396 at para. 71, when I said that the parties' intention will be given weight only if the contract properly reflects the legal relationship between the parties.

[36] Because the *Wolf* decision involved a contract in which the law of Québec applied, Desjardins, J.A. added:

[82] For the purpose of disposing of this case, I need not decide whether the words "the intention of the parties" have conceptually the same extension in the common law systems as in the civil law of Quebec. This matter can only be decided on a case by case basis.

[37] In the within appeals – as in *RWB* – there was no disagreement between Dupuis – on behalf of the appellant corporation – and Parks or Bellemare as to their intention. Parks had driven truck on and off for ALD for many years and had never been an employee. Also, he had done construction work for ALD and in the context of his own business and charged for his labour and for materials. Bellemare had driven a truck previously - as an independent contractor - for a competitor of ALD and wanted to retain that status. There is no hint of any sham or artifice or revisionism inherent in the evidence of Dupuis, Parks or Bellemare. According to all parties, the written agreements that were signed at some point later on in the working relationship, merely ratified and confirmed the terms of the arrangement that had been in place. The CCRA audit prompted the parties to sign said agreement but there was no pressure exerted by Dupuis to do so and in fact it was Bellemare who suggested to Dupuis that ALD have an independent contractor agreement drafted and offered to drivers for their acceptance.

[38] Justice Miller – Tax Court of Canada – heard an appeal subsequent to *RWB*. In the case of *Vida Wellness Corporation DBA Vida Wellness Spa v. M.N.R.*, T.C.J. 534, 2005-1677(EI), (*Vida*) he considered the work situation of six massage therapists whom the Minister considered to have been engaged in both insurable and pensionable employment notwithstanding each worker had entered into a written agreement in which it was stipulated they were independent contractors. In the course of reviewing the facts, Justice Miller noted that all workers had spent thousands of dollars and a significant number of hours training in order to obtain the necessary qualification to perform their work. The therapists were remunerated based on a rate varying between 27.5% and 47% of the fee received by Vida Spa from the client. They could earn a commission as a result of selling spa products. If the workers showed up for a shift and there were no customers, no remuneration was paid to them. They were entitled to retain cash tips but had to pool tips paid through credit cards. The workers were able to schedule their shifts three or four times a year for three or four months at a time and Vida Spa operated two shifts per day. Workers could work - or not - as they chose and were able to provide their services to other massage therapy businesses provided they did not solicit those customers to switch their patronage from Vida Spa. The payor in Vida provided tables, linens, oils and workers were required to wear black pants and shirts in order to provide consistency. Justice Miller referred to certain risks inherent in the performance of their duties and at paragraph 11 stated:

> [11] Ms. Hegedus and the workers described some inherent risks in providing massages. Particular attention had to be paid to massages of pregnant women, avoiding certain parts of the body and even avoiding certain oils. Similarly, if a

> customer displayed any pre-existing condition or contra-indication the workers would proceed cautiously. For these reasons, it was important that the workers obtain a fairly detailed medical history prior to providing a massage. The workers were required by their governing body to carry insurance. Vida did not pay for the workers' coverage.

[39] After referring to the relevant jurisprudence including *Wolf*, *Sagaz*, *RWB*, supra, Miller, J. – at paragraph 18 of his reasons stated:

> [18] Following this approach, was there a clear understanding between Vida and the workers as to the nature of the contract? Yes, there was. There was a written agreement which stated unequivocally the workers were independent contractors. Yet, a clear statement of intention alone is not determinative. For example, if the parties to a contract simply want to avoid the employer making source deductions, they insert a provision stipulating the worker is an independent contractor and is responsible for looking after his or her own source deductions. This is evidence of an intention that the employers not make source deductions: it is not evidence of an independent contractor relationship. In this case, however, I am satisfied the parties' intention to create a contract of independent contractor is clear. The Respondent argued that there was not so much a clear intent to be independent contractors, as there was an indifference to their status. There was no evidence to suggest any of the workers would have preferred employment status. They all knew what was being offered, appeared to have understood the implications (for example, no minimal wage) and certainly willingly signed an agreement proclaiming their independent contractor status. While the circumstances do not reflect an insistence by the worker on the independent contractor status (except perhaps for Ms. Frame), they do reflect something more than indifference.

[40] Justice Miller then began analyzing the various factors of control, risk of loss, chance of profit and ownership of tools in order to determine whether said factors were consistent with the stated intention of the parties that the workers supply their services as independent contractors. In my view, paragraph 20 of his judgment is extremely important because it addresses the problem that can occur by looking through the wrong end of the telescope. Miller, J. commented:

> [20] It is important to distinguish at the outset between the identifying elements of employee versus independent contractor, as opposed to the results of the finding of employee or independent contractor. For example, in attempting to identify the difference between employed massage therapists and those massage therapists opting for independent contractor status, Ms. Hegedus suggested the following:
>
> - employee received 4% vacation pay;
> - employee received time and one-half on statutory holidays; and

- employee was entitled to severance.

> These, however, are differences arising as a result of being an employee. They are not factors that go to identifying an employment relationship. The identifying factors are those I have listed earlier.
>
> [21] How fine the line can be between employment and independent contractor cannot be any better demonstrated than by this situation. The workers can choose to take the benefits that flow from employment, or reject them for the benefits that flow from being self-employed. That choice, willingly agreed to by Vida, cannot be ignored for purposes of the analysis. Indeed, it sets the stage for the analysis.

[41] Miller, J. considered the element of control to be consistent with the relationship the parties had agreed to and while he put little emphasis on the ownership of tools, found that factor was no more consistent with employment than with the status of independent contractor. With respect to the chance of profit, Miller J. found there were a number of things a Vida Spa worker could do to maximize earnings including double shifting or refusing to take shifts during slow times and to promote an ensuite or deep tissue massage for which the worker to retain the extra fee without sharing with Vida Spa. As well, the massage therapists could promote the sale of products and earn commission and could avoid providing services to customers whose medical coverage paid a lesser fee than that ordinarily charged by Vida Spa. Dealing with the factor concerning the risk of loss, Miller, J. - at paragraphs 28-31, inclusive – stated:

> [28] A business loss can arise in at least three ways; first, the business' ordinary expenses outstrip the business' regular income; second, there can be a catastrophic event arising from harm done by the operation of the business; and third, the source of business income can dry up.
>
> [29] The workers did incur some expenses, for example, cellular telephone, updating and training (including the cost of courses offered by Vida itself), and insurance. It is unlikely though that such expenses would surpass their income, although for a particularly slow period with few or no customers, there may have been some slight risk. Recall, no customers – no remuneration.
>
> [30] The possibility of risk from causing harm however was very real. The witnesses explained the potential danger of treating pregnant women or those with pre-existing conditions. Results can be harmful to the point of being lethal. For this reason, the workers were required by the governing body to carry insurance. Vida did not cover the workers' insurance. It was their responsibility.
>
> [31] Finally, the possibility of losing Vida as a source of income was also very real. There was no security. The contract could be terminated on two weeks'

> notice for any reason, with no remuneration. I would characterize these circumstances as accepting a significant risk of loss consistent with someone in business on his or her own account.

[42] At paragraph 32, Justice Miller concluded:

> [32] Reviewing the traditional factors in light of the parties' understanding of the nature of their contract has satisfied me that the contract does accurately represent the legal relationship of a contract for services. The workers intended to be and were independent contractors.

[43] In an earlier decision of mine – *F.G. Lister Transportation Inc. v. Canada (Minister of National Revenue – M.N.R.*), [1998] T.C.J. No. 558, 96-2163(UI), I heard the appeal of the employer that claimed its long-haul drivers were independent contractors. No driver testified and the evidence of intention came solely from the Vice-President and Controller who was familiar with the day-to-day operations of the company. In paragraphs 12-14 of that judgment, I commented as follows:

> [12] It is clear the business was that of the appellant, a transportation company which was a wholly-owned subsidiary of a parent-corporation engaged in the business of selling and distributing produce. While the appellant had local drivers who functioned on the basis of being employees, the long-haul drivers were treated differently without any apparent reason to have done so other than the method by which their services were engaged - a trip-by-trip basis - and the system of payment per kilometre rather than on an hourly basis. The local drivers probably could have undertaken the long-hauls but they may not have held the proper licences or qualifications to operate the larger units in various jurisdictions. In that sense, the appellant had made a distinction between the two types of drivers and, as a result, the long-haul drivers named in the decision issued by the Minister were persons who were providing a service integral to the appellant. There is no evidence, at all, that any driver - or the appellant - ever acted in a manner consistent with a driver being in business as an independent contractor.
>
> [13] I now find myself in the position of being required to point out the differences in the facts in the within appeal and those in two other decisions issued by me in which I held the drivers were independent contractors. In the case of *Lee (c.o.b. D & A Transport) v. M.N.R.* [1995] T.C.J. No. 426 I held the driver of a long-haul transport truck to have been an independent contractor. In that case, the driver had registered his business for purposes of the Goods and Services Tax, maintained a business bank account and had filed income tax returns on the basis of being self-employed. In *Lee,* the appellant had earlier been an employee of the payor and had agreed to alter the working relationship and there was clear evidence he could have hired another driver to work for him on long-hauls thereby generating a profit. As well, in *Lee*, it came down to choosing between two versions of circumstances surrounding a working relationship and the choice

> did not favour the worker. I also held the tools of the trade were the personal skills of the driver as a qualified person capable of hauling a loaded trailer over long distances. That finding was in the context of the driver operating a business under the trade name, Rick's Driving Services, having a bank account under that name and otherwise doing business with third parties on that basis. Income tax returns had been filed on the basis the worker was a self-employed person.
>
> [14] In another decision of mine, *Metro Towing Ltd. v. M.N.R.* [1991] T.C.J. No. 717, I found a tow-truck driver to have been an independent contractor. In that case, while there was a high degree of control over the worker, he had leased the vehicle and all of the equipment needed to carry out his task and bore all of the costs, including insurance, relating thereto. That driver also had a substantial risk of loss arising from the operation of that vehicle in the event he was not able to generate sufficient gross revenues which fluctuated on a monthly basis, as did, to a lesser extent, his costs of operation. In that case, like *Lee, supra*, the worker had earlier been on the regular payroll and had decided to enter into a new arrangement whereby he was the lessor of a truck and certain equipment and would be entitled to receive 30% of gross towing revenue arising from jobs which were dispatched by Metro Towing Ltd. The evidence in the *Metro Towing Ltd.* appeal disclosed that other tow-truck drivers operated through a limited company or a partnership arrangement.

[44] There are other decisions – some of them mine – that held truck drivers were employees despite efforts of the payor to have them characterized as independent contractors – operating a business on their own account - in the course of providing the service of driving. However, the facts in each case are extremely important and it does not require much variation in order to arrive at a different result, although the distinction may not be apparent even to those who toil in this often murky field of jurisprudence.

[45] The difference in philosophy with respect to the matter of intention of the parties was put into sharp focus by Evans, J.A. in the course of his dissenting reasons in *RWB* as expressed in paragraphs 96-105, inclusive, as follows:

> [96] Because the more recent cases from this Court discussed in the reasons of Sharlow, J.A. all place some reliance on the *Civil Code*, I cannot regard them as elevating the significance traditionally attached by the common law of contract to the parties' understanding of the legal nature of their contract. When the scope of federal legislation refers to a private law concept, which is not defined in the statute, the bijural nature of our federation leaves open the possibility that the statute may be applied differently in Quebec from common law Canada: *Interpretation Act*, R.S.C. 1985, c. I-21, section 8.1; see also, for example, *9041-6868 Québec Inc. v. Canada (Ministre du Revenu national*), 2005 CAF 334 at para. 6.

[97] I do not know to what extent the *Civil Code* differs from the common law in the manner in which contracts are to be characterized, or whether any of those cases would have been decided differently on the basis of the common law approach as I have described it.

[98] When a dispute arises over the proper legal character of a contract, there are good reasons to attach little if any weight to the parties' understanding of it, or to their objective in entering into the contract. First, it is difficult to understand on what basis the parties' view of their contract's legal characterization is relevant, or how it should be weighed with the objective *Wiebe Door/Sagaz* factors. It is one thing to draw an inference about the legal nature of a contract based on, for example, the factors of control, and risk of loss and opportunity for profit. It is quite another to draw an inference from the parties' view of the legal nature of their contract, which is the ultimate question that the court must decide. It is not a legal characteristic of a contract for the supply of services that the parties intended to enter that kind of contract.

[99] Secondly, the parties' view of the legal nature of their contract is inevitably self-serving. Parties generally care primarily about their ultimate objective and only secondarily, if at all, about the legal means of achieving it. Suppose, for example, that their objective was to be exempt from EI premiums. The legal means of achieving this is by entering into a contract for the supply of services. Whether they succeed depends on whether the terms of their contract and their conduct are more consistent with the indicia of a contract for the supply of services than of employment. To the extent that they have thought about it, parties will want to enter into the kind of contract that in law will enable them to attain their ultimate objective.

[100] Similarly, the law attaches little or no weight to the fact that the parties' conduct is consistent with the legal *consequences* of having entered into a contract for the supply of services. These consequences may include the payor's exemption from having to deduct and pay EI premiums and CPP contributions, and the service provider's obligation to register for and to charge GST. These are the legal consequences of a contract for the supply of services, not proof of its existence. The fact that the parties may intend these consequences does not assist in determining whether they have adopted the legal means of achieving them, namely, entering into a contract which has the characteristics of a contract for the supply of services, rather than of employment.

[101] Third, parties to contracts for the performance of work (to use a neutral term) are often not in equal bargaining positions. To attribute appreciable weight to a statement in the contractual document signed by the parties that the contract is one for the supply of services may disadvantage the more vulnerable party, who may subsequently say, for example, that she intented the relationship to be one of employment so that she would be covered by EI.

> [102] In the face of a clear provision in a signed contract that it is a contract for the supply of services, not a contract of employment, it may be difficult for such a party to deny that, on an objective analysis, this provision embodied the parties' common intention, at least in the absence of misrepresentation or duress. In other words, the vulnerable party is not only bound by the terms of the contract, but her contractual status and, consequently, her statutory rights, may also be prejudiced by the stronger party's legal characterization of the contract.
>
> [103] Fourth, the legal characterization of a contract may have an impact on third parties, such as the victim of a tort committed by a service provider in the course of performing the contract or, as in this case, Revenue Canada. Not to base legal characterization squarely on the terms of the contract, interpreted contextually, may jeopardise those interests, and undermine non-voluntary protective statutory programs, such as EI and CPP.
>
> [104] I am concerned also about the impact on other dancers with the RWB of a finding about the contractual status of the dancers in this case. If the understanding of the dancers is significant to the decision, could the result be different in the case of another dancer with the RWB who denied entering into his contract on the understanding that it was a contract for the supply of services? It seems odd that essentially the same contract could be characterized differently on this basis.
>
> [105] In my opinion, the only significant role of the parties' stated intention or understanding about the legal nature of their contract is as part of the interpretative context in which the court views the contract in order to resolve ambiguities and fill in silences in its terms.

[46] As I read the majority decisions in *RWB*, it seems to me the element of intention has been elevated to the status of supernova. The consequent, exploding mass is currently capable of illuminating to a novel intensity those factors traditionally considered more or less as equals when determining the issue of employee vs. independent contractor. Now, each indicia has to be examined in order to determine whether there are matters of substance such as deception, coercion or other circumstances creating clouds of uncertainty within the working relationship that – as a combined force – are sufficient to block those intense beams emitted by the glorious sun of mutual intention through which the parties purported to characterize their status. Even as one accepts the admonition inherent in the *RWB* decision not to be blinded by the glare, one must admit it has the effect of compelling an examination of the relevant factors in a different light. In the course of considering those customary indicia, I consider the control factor – formerly an equal – now to be more equal than the others. Within the context of a poker hand, sometimes certain factors were aces and sometimes they were deuces but there was never any question of assigning to any one of them a rank above the others. In my opinion, the control factor has been

granted supremacy and is now the trump card where the intent of the parties is not in doubt in the course of determining the true nature of the working relationship.

[47] In the within appeals, I reiterate there is no doubt about the good faith of the parties. The drivers – Parks and Bellemare – wanted to provide their services within the context of operating their own business. Parks had never provided his services to ALD in any other context whether driving truck or carrying out construction/renovation projects for ALD or other customers. Bellemare had driven for another company as an independent contractor and was adamant that status continue when driving for ALD. He and Parks both thought working as an independent contractor provided a sense of freedom - in conformity, perhaps – with the erstwhile perception of long-haul truckers as Knights of the Open Road.

[48] With respect to the element of control, there was no supervision of their driving function or any other aspect of their duties during the course of the various trips they accepted. Certainly, there was less control over their performance than that exercised in relation to the RWB dancers. The drivers did not have an opportunity for profit like the massage therapists in Vida nor did they have a real risk of loss as a result of carrying out their duties. They did not need to carry out any management functions nor hire helpers in order to drive the ALD tractor and trailer from A to B to C and back nor did they provide tools of any consequence.

[49] Without the *RWB* decision, I would not have considered the clear intention of the parties to have been as compelling, particularly within the context of the combined effect of the other factors. However, the drivers in the within appeal were unwavering in their pursuit of the desired status of independent contractor and there was no subsequent material deviation in their conduct nor on the part of the employer. The parties acted throughout in conformity with their stated intention and there were no unusual circumstances arising within the course of the working relationships that damaged – let alone obliterated - the effect of their original agreement.

[50] The appeals (2006-149(EI)) and 2006-150(EI)) are hereby allowed and the decisions of the Minister – both dated October 14, 2005 - are varied to find that neither David Parks nor Remi-Paul Bellemare was in insurable nor pensionable employment with ALD Enterprises Inc. during any part of the relevant period stated in said decisions because neither was employed pursuant to a contract of service.

[51] The appeal – 2006-151(CPP) is allowed and the relevant decision is varied to find that David Parks was not an employee of ALD Enterprises Inc. during the period

from January 1, 2003 to December 17, 2004, because he was not engaged under a contract of service.

Signed at Sidney, British Columbia, this 12th day of February 2007.

"D.W. Rowe"

Rowe, D.J.

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